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PATENT
Docket No. H 4420 PCT/US

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant: Akram et al.
Appl. No.: 10/069,849
Filed: February 28, 2002
Grp./A.U.: 1751
Examiner: Eisa B. Elhilo
Customer No.: 00423
Confirm No.: 5227
Title: METHOD FOR COLOURING HAIR

Mail Stop Appeal Brief - Patents
Commissioner of Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF

Applicants appeal under 37 C.F.R. § 1.192(a) from the Final Office Action of June 25, 2004. A Notice of Appeal and payment of the appeal fee under 37 C.F.R. § 1.17(b) was filed on September 22, 2004. A request for a one month extension of time accompanies this Appeal Brief.

I. Real Party In Interest

The real party in interest in this appeal is the assignee, Hans Schwarzkopf GmbH & Co. KG (Hans Schwarzkopf).

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II. Related Appeals and Interferences

There are no related appeals, interferences or judicial proceedings known to applicants, assignee, or their legal representatives that will affect or be affected by or that have a bearing on this appeal.

III. Status of the Claims

The claims on appeal are 18-23 and 26-40. Claims 1-17 and 24-25 have been canceled. The claims appear in the Appendix.

IV. Status of Amendments

There are no amendments that were filed subsequent to the issuance of the Final Rejection.

V. Summary of Invention

The present invention defines a process for coloring keratin fibers via a two-stage process in which the fibers are treated with a pretreatment composition in the first stage. The pretreatment composition contains at least one substantive dye and at least one fiber-structure-improving agent. After the pretreatment composition is applied, the second stage is applied. This stage consists of a composition containing at least one synthetic dye or precursor. [Claim 18: page 2, lines 25-29, and page 4, lines 28-30].

Also claimed is a process for coloring hair comprising applying to the hair the two-stage treatment previously described. This process results in a uniform color over the entire length of the hair. [Claim 38: page 2, lines 25-29; page 4, lines 28-30 and page 22, lines 17-19].

VI. Grounds of Rejection

Claims 18-23 and 26-40 stand rejected under 35 USC 103(a) as being unpatentable over Grollier et al. (U.S. 4,425,132) in view of Nicolas-Morgantini et al. (U.S. 5,954,871).

VII. Argument

Grollier et al. disclose a two step process for coloring keratin fibers. However, they fail to disclose or even suggest that a keratin fiber structure improving agent might be capable of being incorporated into the ingredients used in the first step of their process. They disclose that the ingredients that may damage hair, such as peroxides, are applied during a first step. Then, ingredients, such as conditioners, included in the composition of a second step, are added to improve the performance characteristics of the hair.

Appellants have discovered that it is possible to add keratin fiber structure improving agents to the first stage of a hair coloring formulation without experiencing a reduction in coloring efficacy. It is commonly known that the benefits imparted to keratin fibers by the use of such

components are compromised by some of the other ingredients contained in the formulation of the first stage, such as oxidizing agents. Appellants have discovered that it is possible to include fiber structure improving agents in the first stage without compromising their effectiveness. Grollier et al. do not teach or even suggest that it would have been possible to combine fiber structure improving agents with components such as peroxides within the same stage of a formulation.

Nicolas-Morgantini et al. disclose a wax-based cosmetic preparation consisting of only a single application step. The colorants contemplated within the scope of their disclosure are "pigments" that have "film-forming properties" (column 1, lines 32-43). Pigments are quite different from the substantive and oxidative dyes employed by either Grollier et al. or Appellants. Substantive and oxidative dyes provide long-term coloration to keratin fibers. The preparations of Nicolas-Morgantini et al. are designed to provide only short-term coloration (please note the examples of mascara formulations; mascara is intended to provide coloration essentially for only a single day). Grollier et al. relates to substantive hair dyes while Nicolas-Morgantini et al. relates to temporary film forming pigments. There is no incentive to combine these two references since they each relate to entirely different mechanisms for coloring keratin fibers.

In the Final Office Action dated June 25, 2004, the Examiner stated that Nicolas-Morgantini et al. employ "a fiber structure-improving agent of panthenol". It must be

pointed out, however, that at no place does this reference describe or otherwise refer to panthenol as being "a fiber structure-improving agent". The labeling of panthenol and its derivatives as fiber structure-improving agents comes, not from this reference but from Appellants' own disclosure.

The Examiner concludes that it would have been obvious to replace hydrogen peroxide with the enzymes of Nicolas-Morgantini "and also to incorporate panthenol in the composition [of Appellants] with a reasonable expectation of success for improving hair properties." However, there is no suggestion or guidance from this reference to add panthenol for this purpose. The inclusion of panthenol into the formulation of Example 1 is not sufficient. The reason for the presence of panthenol in the example is not indicated. Thus, how can it be considered obvious to an ordinary skilled practitioner to "incorporate panthenol...with a reasonable expectation of success for improving the hair properties" if the reason for adding panthenol is absent?

Further, the meaning of the term "improving the hair properties" is somewhat vague and, in this instance, cannot be interpreted to refer to a process for improving the structure of keratin fibers. The only hair properties referred to in either reference are combability and feel (Grollier et al.: column 12, lines 10-12). It is therefore respectfully submitted that nothing in these references, either separately or when combined, suggests that compounds such as panthenol might be used to improve the structure of

keratin fibers that have been damaged by oxidative dye processes.

CONCLUSION

For the reasons stated above, the Examiner's final rejection of claims 18-23 and 26-40 should be reversed. The Commissioner is hereby authorized to charge the Appeal Brief Fee of \$500.00 to Deposit Account No. 01-1250. Order No. 04-0471. Should any fees be due for entry and consideration of this Brief that have not been accounted for, the Commissioner is authorized to charge them to Deposit Account No. 01-1250.

Respectfully yours,



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VIII. CLAIMS APPENDIX

1.-17. (Canceled)

18. (Previously presented): A process for coloring keratin fibers comprising:

(a) applying a pretreatment composition onto keratin fibers, wherein the pretreatment composition comprises at least one substantive dye and at least one fiber-structure-improving agent; and

(b) applying to the keratin fibers a coloring composition comprising at least one synthetic dye or synthetic dye precursor or combinations thereof, after applying the pretreatment composition.

19. (Previously presented): The process of claim 18, wherein the pretreatment composition is applied to the keratin fibers by spraying.

20. (Previously presented): The process of claim 18 wherein the substantive dye of the pretreatment composition is selected from one or more nitrobenzene derivatives, basic substantive dyes or triphenylmethane derivatives, or combinations thereof.

21. (Previously presented): The process of claim 20 wherein the substantive dye is selected from 3-nitro-4-aminophenol, 4-(3'-hydroxypropylamino)-3nitrophenol, 1,4(bis-(β -hydroxyethyl)-amino-2-nitrobenzene, 1-(β -hydroxyethylamino)-2-nitro-4-aminobenzene, 1-(β -hydroxyethylamino)-2-nitrobenzene, 4-(β -hydroxyethylamino)-

3-nitrophenol, HC Blue 2, Basic Blue 99, Basic Red 76, Basic Brown 16 or Basic Brown 17, or combinations thereof.

22. (Previously presented): The process of claim 21 wherein the substantive dye is present in the pretreatment composition in an amount of 0.001 weight percent to 20 weight percent, based on the total weight of the pretreatment composition.

23. (Previously presented): The process of claim 22 wherein the substantive dye is present in the pretreatment composition in an amount of 0.005 weight percent to 5 weight percent, based on the total weight of the pretreatment composition.

24-25. (Canceled)

26. (Previously presented): The process of claim 18 wherein the fiber-structure-improving agent is selected from panthenol, one or more physiologically compatible panthenol derivatives, one or more plant extracts or honey, or combinations thereof.

27. (Previously presented) The process of claim 18 wherein the fiber-structure-improving agent comprises panthenol.

28. (Previously presented): The process of claim 18 wherein the pretreatment composition is contacted with the keratin fibers for 1 to 30 minutes before applying the coloring composition.

29. (Previously presented): The process of claim 28 wherein the pretreatment composition is contacted with the keratin fibers for 1 to 10 minutes before applying the coloring composition.

30. (Previously presented): The process of claim 18 wherein the pretreatment composition has a pH range from 3 to 9.

31. (Previously presented): The process of claim 30 wherein the pretreatment composition has pH ranging from 4 to 8.

32. (Previously presented): The process of claim 18 wherein the synthetic dye precursor of the coloring composition comprises at least one oxidative dye precursor.

33. (Previously presented): The process of claim 32 wherein the oxidative dye precursor comprises at least one primary intermediate selected from p-phenylenediamine, p-toluylenediamine, p-aminophenol, 1-2'-hydroxyethyl)-2,5-diaminobenzene, 4-amino-3-methylphenol, 2-aminomethyl-4-aminophenol or 2,4,5,6-tetraaminopyrimidine, or combinations thereof.

34. (Previously presented): The process of claim 33 wherein the oxidative dye precursor further comprises at least one secondary intermediate selected from 2-chloro-6-methyl-3-aminophenol, 5-amino-2-methylphenol, 2-amino-3-

hydroxypyridine, 2,6-di-(β -hydroxyethylamino)-toluene, 2-methyl resorcinol or 1-naphthol, or combinations thereof.

35. (Previously presented): The process of claim 32 wherein the oxidative dye precursor comprises at least one secondary intermediate selected from 2-chloro-6-methyl-3-aminophenol, 5-amino-2-methylphenol, 2-amino-3-hydroxypyridine, 2,6-di-(β -hydroxyethylamino)-toluene, 2-methyl resorcinol or 1-naphthol, or combinations thereof.

36. (Previously presented): The process of claim 32 wherein the oxidative dye precursor is oxidized with an oxidizing agent comprising hydrogen peroxide.

37. (Previously presented): The process of claim 32 wherein the oxidative dye precursor is oxidized with an oxidizing system comprising one or more enzymes.

38. (Previously presented): A process for coloring hair comprising applying to hair a pretreatment composition comprising at least one substantive dye and at least one fiber-structure-improving agent, and subsequently applying a coloring composition to obtain a uniform color over the length of the hair.

39. (Previously presented): The process of claim 38 wherein the pretreatment composition is applied to the hair by spraying the pretreatment composition onto the hair.

40. (Previously presented): The process of claim 38 wherein the pretreatment composition is applied to only the end portion of the hair.

IX. EVIDENCE APPENDIX

No evidence is provided.

X. RELATED PROCEEDINGS APPENDIX

There are no relevant judicial or administrative
decisions to provide.